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Jack L. Sammons

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THE LAW'S MELODY

JACK L. SAMMONS*

"The prevalence of song throughout the world speaks even to our generalizations about that part of the experienced world we call law."¹

REGARDING "law," as Joe Vining teaches us, there is nothing we can point to and say: "That is it." Those things we might be tempted to think of as law are only evidence of it and not the thing itself.² For someone like Joe, who resists the theoretical and insists that truthful thought starts in trusting perceptual beliefs, "in the empirical" as he often describes it, this is a problem. And yet Joe has, through his work, shown us "law," and, true to his understanding of it, he has displayed it in a manner that, in Schelling's words, seeks to "... enlarge our thought so that it shall be in proportion to the phenomenon."³

But how can this be? What possible ontology could account for the law Joe displays? And by what epistemology could we know it? I want to offer to you one way of understanding law as Joe has displayed it for us by drawing upon an analogy to music. Our perceptions of music, I believe, offer us the shortest, least arduous, and most natural route into such matters of ontology and epistemology.⁴ For it is easier for us to trust the

* © Jack L. Sammons 2010, Griffin B. Bell Professor of Law, Mercer University School of Law, Mercer University, Macon, Georgia. Primary thanks are owed to my son, Lanier Sammons, a composer to whom I owe much of my understanding of music. He is, however, not to be blamed for the limits of this understanding. In the course of working on this speech, I was greatly assisted by many dear friends and colleagues, most especially Bishop Dan Edwards, Rabbi Michael Goldberg, and professors Linda Edwards, Mark Jones, Hal Lewis, David Ritchie, Karen Sneddon, and James Boyd White. Finally, Joe Vining, to whom this is dedicated, has made it possible for me and for many people like me to value our odd thoughts about the law and lawyers because he seems to value them as well. I am greatly in the debt of this extraordinarily generous man.

1. JOSEPH VINING, FROM NEWTON'S SLEEP 24 (1995).

2. *Id.* at 26.

3. VICTOR ZUCKERKANDL, SOUND AND SYMBOL: MUSIC AND THE EXTERNAL WORLD, Introduction (1956) (quoting FRIEDRICH WILHELM JOSEPH SCHELLING, PHILOSOPHIE DER MYTHOLOGIE (Nabu Press 2010) (1842)).

4. There are many reasons for this, most of which I imagine are obvious. I will mention only a few here: music leaves behind the ordinary assumptions we make about language and "speaks" in a language in which many of these assumptions are not germane; we more readily think of music as an art irreducible to technique and, in doing so, distance ourselves from technical thinking which hide issues of ontology and epistemology; music seems less abstracted from its matrix in the whole body than speech does and, because it does, its expressive nature remains clearer to us than that of language, especially scientific language; in being more obviously more expressive than descriptive, music challenges the assumptions of knowledge inherent in all descriptions; in all this music makes clearer to us that epistemology can be a matter of character which in turn raises ontological

perceptual beliefs we have about music than it is those we may have about law.

Substantively I will not be saying that much new to those of you familiar with Joe's work, but I will be saying it quite differently and exploring a bit the implications of this different description. After this, and taking advantage of the most temporal of arts, I would like to use the analogy to music to explore very briefly the temporality of law, a subject to which Joe has also turned.⁵ Finally, I will conclude with a word or two to get us started, I hope, on the question: What must the world be like, what must we be like, if between the world and us such a phenomenon of law can occur?⁶

Our jurisprudence, even our country at times, seems divided, between those for whom the law is within the outer world and those for whom it is not and is entirely native to, and a projection of, an inner world.⁷ Prior to several centuries of domination by the materialism of scientific thinking, locating the law externally to us made perfectly good sense for, despite its immateriality, the law could be found to have its source in God, the Divine, the World Soul, and so forth, all of which were fully external to us. Having such sources, the authority we recognized in the law made perfectly good sense to us as well.

But after this domination of our thinking, the law's lack of materiality now means for many that there can be no location for the law possible other than solely within us. Anything else would be far too mystical, far too "spiritual," and any attempt to ground the law in a materiality would be doomed to failure. But, if so, how now are we to understand the authority of law, much less of justice, if law is not found physically outside of us in some fashion? Locating it solely internally seems to render law a self projection with no real authority of its own.

Thus, those for whom the law remains in the outer world have the problem of explaining its materiality; those for whom the law is in the

issues; and so forth. All of this is well explored in ROBIN GEORGE COLLINGWOOD, *THE PRINCIPLES OF ART* (1938).

5. See, e.g., Vining, *supra* note 1, at 329-54.

6. When Kant put his fundamental question, "How is natural science possible?" he did not seek to know if it is possible (he saw that it existed); he sought to know what the world must be like, what I must be like, if between me and the world such a thing as natural science can occur. What must the world be like, what must I be like, if between me and the world the phenomenon of music can occur. How must I consider the world, how must I consider myself, if I am to understand the reality of music.

ZUCKERKANDL, *supra* note 3, at 6-7.

7. This is a variation on what Steven D. Smith describes as "law's quandary" in his remarkable book—remarkable in its beautiful combination of depth and clarity—of the same name. See generally ZUCKERKANDL, *supra* note 3, at 6-7. What I have done in the text that follows, essentially, is combined Steve Smith's formulation with the one Zuckerkandl used to introduce the different ontology revealed to us in the forces of music. See ZUCKERKANDL, *supra* note 3, at 56-63.

inner world, have the problem of explaining its authority. Each view is subject to reduction by technique and the two only meet when the inner world group seeks to reject technique with claims of the law's grounding in a practical wisdom that it cannot readily explain. And, although seldom expressed as I have expressed it, the difference between these views is a difference seen by many as somehow central to their identities.

But perhaps these two ways of the law being, external and material or internal and psyche, do not exhaust the possibilities. Perhaps music can assist us in seeing beyond these limits. Let us start then, with the help of the philosopher of music, Victor Zuckerkandl,⁸ with a description of tones.

What makes a tone a tone, Zukerkandl says, as opposed to just a sound, is a certain "dynamic quality" for each tone exists in a definite state of activity determined by its relationship to other tones which we hear in the tone itself.⁹ This can be experienced as "a tension, a tendency, almost a will."¹⁰ A tone located near the end of a phrase, for example, "seems to point beyond itself toward release from tension and restoration of equilibrium; it seems to look in a definite direction for the event that will bring about this change; it even seems to demand this event."¹¹ Each tone in each location will have this dynamic quality and it is this quality "that permits tones to be conveyors of meaning" and that "makes melodies out of a succession of tones."¹² This is not to say that tones only acquire their dynamic quality in melodies "for each tone carries within itself relation to a larger whole"¹³ and in each "there is the promise of a whole that it bears within itself."¹⁴ This is why we hear the very first tone of a composition as dynamically active.¹⁵

Notice that a tone is a phenomenon of the external world, but its dynamic quality is not. "Nothing in the physical event corresponds to the

8. See *id.*; VICTOR ZUCKERKANDL, *MAN THE MUSICIAN* (1973); VICTOR ZUCKERKANDL, *THE SENSE OF MUSIC* (1959). Zuckerkandl's work is an elaborate formalistic philosophy of a meaning of music found in music itself as opposed to those schools of thought for whom music's meaning is found in extra-musical references or representations especially in the emotions. As such it builds upon "the theory of organic structure," offered earlier by Heinrich Schenker. This is especially true in Zuckerkandl's last work. See, e.g., ZUCKERKANDL, *supra* note 3, at 169-216. Zuckerkandl has been sadly neglected, I believe, but returned to us most recently by the good work of Kathleen M. Higgins and Jeremy S. Begbie. See JEREMY S. BEGBIE, *RESOUNDING TRUTH: CHRISTIAN WISDOM IN THE WORLD OF MUSIC* (2007) [hereinafter BEGBIE, *RESOUNDING TRUTH*]; JEREMY S. BEGBIE, *THEOLOGY, MUSIC, AND TIME* (2000) [hereinafter BEGBIE, *THEOLOGY, MUSIC, AND TIME*]; KATHLEEN M. HIGGINS, *THE MUSIC OF OUR LIVES* (1991).

9. ZUCKERKANDL, *supra* note 3, at 19-21.

10. *Id.* at 19.

11. *Id.*

12. *Id.* at 21.

13. *Id.* at 27.

14. *Id.* at 37.

15. *Id.*

tone as a musical event.”¹⁶ Thus, “when we hear a melody, we hear things that have no counterpart in physical nature.”¹⁷ And yet a melody is the product of the dynamic quality of tones, fully external to us and not qualities of the listener’s response.¹⁸ Hearing music, then, means hearing forces: “a manifold play of forces [that] takes place without any corresponding occurrences in the physical world.”¹⁹ To emphasize the point, Zuckerkandl says that the description “hearing forces” “was not meant as a linguistic short cut; the phrase [means] exactly what it [says].”²⁰

What you perceive as melody, therefore, is not physical (external and material) nor is it psychic (internal), and you cannot honestly describe what it is without abandoning these categories.²¹ This is not because it is so complicated, but, quite the contrary, because it is so simple and elementary.²² Because it fits neither conception of our knowledge, our perception of melody, our experience of it, displays for us a third way of perceiving and, by analogy, suggests a way around the division of internal and external that so haunts our jurisprudence.²³

What music reveals for us is a non conceptual mode of knowing and a different dimension of being that our ordinary understanding of experience obscures from us or even denies. Note, quickly, that this need not be about something transcendent in the common understanding of this term, for this does not transcend our abilities to perceive, but is a matter of our ordinary perceptions, available to anyone who can hum a tune, and accordingly no particular belief, other than a belief in our perceptions, is required.²⁴ Music, it is said, reveals to us another world,

16. *Id.* at 22.

17. *Id.* at 23.

18. *Id.* at 21-31.

19. *Id.* at 42.

20. *Id.* at 56.

21. *Id.* at 144-45.

22. *Id.* at 36.

23. There can be what we might call the cultural objection to this as there could be to many of the talks at the Symposium. Here this is the idea that our perception of these forces in music is just the product of cultural conventions and, therefore, not a reflection of something that is really there. Zuckerkandl’s response to this is brief and to the point: That someone does not perceive something does not mean it is not there, and some perceptions require learning. Those exposed to Western music and who open themselves to it without reservation, he says, will come to share these perceptions of it. This is, in fact, what seems to happen. See ZUCKERKANDL, *supra* note 3, at 69.

24. To put this in Joe’s terms: “This shaking off inadequate form in a reach for substance, this ‘not only’ and ‘not merely,’ can occur whether or not the word ‘spirit’ enters the conversation.” Joseph Vining, *Is There an Implicit Theology in the Practice of Ordinary Law*, 53 MERCER L. REV. 1047, 1048 (2002). For Joe, of course, “spirit” does enter, but it does so through “person” in a “caring mind” behind text. See VINING, *supra* note 1, at 34. In the text I am being insistent that we not talk in terms of the transcendent in our perception of the “excess” experienced empirically in music and in law, but this is primarily because of the way in which we most commonly use the word “transcendent,” that is, as something that divides our world into different realms. Nothing could be further from what I intend, or, I

and this is true, but, as in Rilke's observation, it is the same as this one.²⁵

It is this different dimension revealed to our perception, this "excess" if you will, of the things we perceive that music, more clearly than anything else, reveals to us. With Jacques Maritain's words, and with music's help, we can say that in this dimension "things are more than they are and give more than they have."²⁶

Musicians, by which I mean composers, performers, and audiences, must attend to this excess as reality. They must seek it out in the particularity of the work. How utterly useless ordinary realism would be to them! To attempt music in a world that took for granted where the boundary lines of our perceptions are to be drawn would always be futile; it would be to miss entirely what music is.

believe, from what Joe intends. With a closely related definitional concern, Nicholas Lash tells us that: "Thus it is that, in current English usage, the concept of the supernatural, which once referred to that which, by God's redeeming grace, his sinful creatures were enabled to do—namely to realize their humanity in truthfulness and love—now refers to entities from outer space." NICHOLAS LASH, *EASTER IN ORDINARY: REFLECTIONS ON HUMAN EXPERIENCE AND THE KNOWLEDGE OF GOD* 102 (1986). All of this, one can see, leads us in Joe's direction of grounding our inquiry regarding law in "person" and our understanding of "text" as coming from a "caring mind." Joe displays the latter for us throughout *FROM NEWTON'S SLEEP*. And, through displaying it, he lets us see how ordinary this is for us. It is not displayed as something mysterious. For any careful thinking about the impossibility of putting intentions into words (think of all that must be taken into account if one is to fully understand what I mean when I say "I'm going to the store"), reveals the impossibility of understanding text without deciding what will be taken into account, which is to say the extent to which we will imagine the person who is the mind behind the text. This has its clear corollaries in music in the questions of what an artwork is and how it means. Joseph Margolis, for example, has shown us that the nature of our understanding of artworks will closely resemble the nature of our understanding of person, suggesting that what I will call in the text an "excess," *i.e.*, properties above and beyond our conceptual understanding of the thing itself, appear in similar ways in both. *See*, JOSEPH MARGOLIS, *ART AND PHILOSOPHY* (1980). Perhaps, this is for similar reasons. I think, then, that the reader of Joe's work will see that while I may appear to be departing from the centrality of "person" to his work, I am hoping, instead, to place this central theme, the insights it offers, and the issues it raises, within a different context that may, upon further reflection, reveal it anew.

25. The artist imagines a world that is both new and secretly inscribed in all that is already seen. ("There is another world but it is the same as this one," in Rilke's famous phrase), and in doing so imagines himself, projects an identity, that is fully in motion towards its now ungraspable completion.

ROWAN WILLIAMS, *GRACE AND NECESSITY: REFLECTIONS ON ART AND LOVE* 167 (2005). Although it certainly sounds like something Rilke would have said, (consider, for example, the ninth *Duino Elegy*), I have not been able to locate the Rilke quotation. It may be that the good Archbishop is confusing this with "There is another world but it is inside of this one" which is sometimes attributed to W.B. Yeats. Preferring the "same as this one" to "inside of this one," and being an Episcopalian, I have opted to trust Archbishop Williams.

26. WILLIAMS, *supra* note 25, at 35 (quoting JACQUES MARITAIN, *CREATIVE INTUITION IN ART AND POETRY* 127 (1960)).

With this understanding of the reality of music, we can readily understand how a good composer or performer can be described as revealing as new meaning something that is there to be revealed in the tones, the rhythm, and the melodies, of music.²⁷ This is not to suggest that composing is only a revealing of what is there. It is not to say that composing is not creative. It is to say that in music any distinction between these two is inherently suspect. The difference is certain to be much less than we might imagine for attending to the reality of music, attending to this “excess,” is an essential part of the act of composing or performing.²⁸

If we want to understand how the law can have its own ontology and how we can know such a law, we need only think of the law in the same way as we have been thinking of music. There is an immediate and obvious problem in doing so, however, for in the law action upon others must be taken. Our concern must be with the moral character of these actions. If, as I am suggesting here, we think of law aesthetically, we could leave issues of justice far behind and find ourselves, following Nietzsche, in thinking of law not as in a relationship to justice, but as the arbitrary cruelty that, in John Milbank’s apt description,²⁹ the excess of reason we call post-modernism says that it is. Instead of this, we want something there in

27. See ZUCKERKANDL, *supra* note 3, at 48. Of course, the view that compositions are to some extent discovered within the materials of music can be controversial. See, e.g., Kathleen Higgin’s discussion of the creationist/discoverist debate. HIGGINS, *supra* note 8, at 35-46. Much of her book can be read as framed around this debate.

28. Speaking more generally, here is how Joe expressed this:

True, beauty is both in the object and in the observer. Both are necessary. In a world where life and time pass, the observer must act and must construct the beauty the observer sees. But she does so on the presupposition that it is there. She seeks to transcend herself. She gives herself life as she gives it life; it gives her life she does not have without it. It cannot be reduced to her and her circumstances.

VINING, *supra* note 1 at 19. For a wonderful, and example filled, exploration of why music’s meaning cannot be reduced to that which is in the thought and imagination of the composer, see G. L. HAGBERG, *ART AS LANGUAGE: WITTGENSTEIN, MEANING, AND AESTHETIC THEORY* 91-98 (1995).

29. JOHN MILBANK, *THE FUTURE OF LOVE: ESSAYS IN POLITICAL THEOLOGY* 145-64 (2009) [hereinafter MILBANK, *THE FUTURE OF LOVE*]. See generally JOHN MILBANK, *THEOLOGY & SOCIAL THEORY: BEYOND SECULAR REASON* (1990) [hereinafter MILBANK, *THEOLOGY AND SOCIAL THEORY*]. As David Bentley Hart put it:

But in an age when, by and large, philosophical decision has been reached—correctly—that the violence of experience must not be placed within a context of transcendent reconciliation, but must simply be met by an earnest and wary ethical vigilance on the part of reflective intellects, beauty—conceived of as a gracious stillness artificially imposed upon the surface of the primordial ontological tumult—mocks the desire for justice; if beauty is really no more than a diversion from the spectacle of worldly suffering, philosophy would be excruciatingly remiss not to assume the aspect of a kind of Brechtian theater, impatient with being’s charms and the mystifying ministry of the beautiful.

DAVID BENTLEY HART, *THE BEAUTY OF THE INFINITE: THE AESTHETICS OF CHRISTIAN TRUTH* 16 (2003).

law or in our relationship to law that addresses this question of its character.

While all this is true of law, it is perhaps a disservice to music to think that this problem does not arise in it as well. In what we have been describing, music's relationship to beauty, which can serve as our analogy to law's relationship to justice, is as something that cannot be willed; cannot be sought in itself, and cannot be independent of the particularities with which the musician is working.³⁰ As Maritain explains, the artist does not aim at the good, but at the good of this or that bit of work,³¹ seeking, as we have seen, to reveal what is there in music.³² Thus, music is not a tool for use in a project larger than itself and extrinsic to the work.³³ Rather, what is most important is the integrity of the work produced.³⁴

If beauty is not something to be willed or produced, then the relationship of music to beauty is not and cannot be toward something that could be revealed and known in some other way. It is not, in other words, teleological. Beauty, as I believe every good musician knows, supervenes upon the particularities of her music when her music is done well.³⁵ This, I also believe, is how good musicians perceive the relationship of their work to beauty. Because she knows its nature, the good musician is humbled by the beauty of her work.

If we are going to think of law aesthetically, perhaps this is how we must approach its relationship to justice.³⁶ But how could such an ap-

30. See WILLIAMS, *supra* note 25, at 37. Williams is offering a description of Maritain's aesthetic of poetry.

31. *Id.* at 15.

32. One of the reasons we often miss this is the transitive-intransitive conflation described by Wittgenstein which, in regards to music, creates an illusion. "[T]hat same illusion possesses us even more strongly if repeating a tune to ourselves and letting it make its full impression on us, we say 'This tune says *something*,' and it is as though I had to find what it says." LUDWIG WITTGENSTEIN, *BLUE AND BROWN BOOK*, 166 (1958). Of course, the tune does say something. The illusion, however, is that it must be found, that is, that what it says is somehow independent of the specific materials in which it is said in the sense that the tune becomes only a translation of something said prior to it.

33. *Id.* at 37.

34. *Id.*

35. Of course, "beauty," as used here, is not to be confused with what others might describe as "the beautiful" in music, *i.e.*, that which is thought of as pleasing. These sorts of issues about "beauty," however, tend to diminish when we think of beauty as supervening upon music rather than being music's product. Beauty, in such a context, becomes the name of an experience which draws our attention. It "defies description and denial with equal impertinence." HART, *supra* note 29, at 16.

36. I must confess that this is not, I think, how Joe would describe the relationship. "It is not Truth and Justice that touch the outcome. They do not act. We act and if they touch us it is through what may be said to us that we attend to and understand." VINING, *supra* note 1, at 43. But I think the two descriptions can be reconciled. The phrase "if they touch us" is what I wish to mean by supervening and I see this, as will be clearer later in the text, as supervening upon what we say, one to the other, in law. In other words, it is a justice that arises from treating each

proach be normative? What, that is, could it have to say about the moral character of the actions that must be taken in law?

There are norms here of what we might call, in theological language, a *via negativa*, as there are in music. There are those things, that is, that are inconsistent with law so understood as there are with music. Interventions, intrusions, invasions, various forms of cheating, as I have described them elsewhere,³⁷ that corrupt the art. Much of what we would desire as morally normative in an aesthetic of law can be found *via negativa*. I would suggest, however, that as important as these norms may be, they are not what is primary here. What is primary is a form of the morally normative that perhaps we do not expect: virtue.

The virtue required for the relationship of judge or lawyer to law for justice to supervene upon their work should be like that of the good musician to music. This is the virtue required for “the more than it is” reality of law, law’s excess, to be part of our relationship with it and an essential element of our legal compositions. Relying on Flannery O’Conner, Rowan Williams describes what is required of the artist in terms that, for us, now can be applied to the lawyer and the judge as well:

[T]he artist looks for the “necessity” of the thing being made, but this “necessity” can only be shown when the actual artistic form somehow lets you know that the necessity is not imposed by the hand of an artistic will but uncovered as underlying the real contingency of a world that has been truthfully imagined, within its own proper time and space, its own causality and coherence.³⁸

If this is true, then our habits of perception as lawyers and judges regarding the law are themselves morally normative matters. In a philosophical sense, this is virtue as prior to justice, for who we are determines what we can know. This is also virtue as epistemology as we confirm once again that there are some things that, to be known, require the transformation of the agent.³⁹ In the simplest of terms, this analogy to music suggests that we must become people in the law for whom justice is possible before we can expect justice to supervene upon our work.

But who are such people? The virtues the law requires of us include those of the self effacement of the musician (or the poet for here I intend no distinction between the two) before the material of his or her work; the

person as signifying, which, I think, is what Joe would insist upon. If you treat what we say, one to the other, in law, as the materials of our art, as I think you must, and if you think that there is a beauty to be revealed in this, a beauty we call justice, then the analogy here works in Vining terms or so I hope.

37. Jack L. Sammons, *Cheating! The Central Moral Admonition of Legal Ethics, Games, Lusory Attitudes, Internal Perspectives and Justice*, 39 IDAHO L. REV. 273 (2003).

38. Williams, *supra* note 25, at 147-48.

39. See, e.g., STANLEY HAUERWAS, WITH THE GRAIN OF THE UNIVERSE: THE CHURCH’S WITNESS AND NATURAL THEOLOGY 50-61 (2001); see also STANLEY HAUERWAS, PERFORMING FAITH: BONHOFFER AND THE PRACTICE OF NONVIOLENCE 111-34 (2004), especially for his description of Victor Preller’s similar argument.

virtue of a self abandonment that is “not a turning away from the self, not a negation, but an enlargement of [self] . . . a breaking down of the barriers separating self from things.”⁴⁰ In the simplest of terms, and with reference to William Carlos Williams (for whom I imagine all this would seem quite unsurprising) this is the humility and the courtesy of reception justice requires of lawyers and judges before “the red wheelbarrows” of the law,⁴¹ the law’s real presence, whose very excess displays our finitude, displays that we are not in control, displays that we are not gods or god, and that in law, as Joe teaches us, we encounter another.⁴²

* * *

Now with the analogy in place, I would like to take advantage of it and use this most temporal of arts to help describe the temporal element of the law. We can start with the obvious: Music must be experienced. As we might also say of trials (which we trust as we trust poetry over prose and for the same reasons), music says to us that “. . . there are things you will learn only by passing through this process, by being caught up in this series of relations and transformation.”⁴³ It demands a commitment of our time and, therefore, of ourselves. It cannot be rushed; it demands our patience,⁴⁴ and this is in part because time itself is an event in music.⁴⁵ Because it is, “time reveals itself to us in our experience of music.”⁴⁶

Part of Joe’s problem of not being able to point to law is that it seems to exist within a time that ordinary time seems not to permit. For the law is not simply something that is an event in time, but is somehow outside of it.⁴⁷ We perceive law exactly this way, as Joe tells us, but we do not have

40. ZUCKERKANDL, *supra* note 8 at 23. One can readily see in this quotation the influence the phenomenologists, especially Heidegger, must have had upon Zuckerkandl. “Thus music is appropriate, is helpful, where self-abandonment is intended or required—where the self goes beyond itself, where the subject and object come together. Tones seem to provide the bridge that makes it possible, or at least makes it easier, to cross the boundary separating the two.” *Id.* at 24-25.

41. William Carlos Williams, *The Red Wheelbarrow*, in *SELECTED POEMS*, 56 (Charles Tomlinson ed., 1985).

42. VINING, *supra* note 1.

43. ROWAN WILLIAMS, *OPEN TO JUDGMENT: SERMONS AND ADDRESSES* 247 (1994).

44. “Music asks for my patience, my trust that there is something worth waiting for. And it does this without promising some particular visible thing or idea or principle we can take away with us when the music is over.” BEGBIE, *THEOLOGY, MUSIC, AND TIME*, *supra* note 8, at 87. I draw upon the form of patience music demands of us later in the analysis and use it, as Begbie does, for its theological implications. See *infra* notes 71-75 and accompanying text.

45. ZUCKERKANDL, *supra* note 3, at 184.

46. *Id.* at 200. See also *id.* at 184. “Music is a temporal art not in the barren and empty sense that its tones succeed one another ‘in time’; it is a temporal art in the concrete sense that it enlists the flux of time as a force to serve its ends.” *Id.* at 181.

47. Here is one of Joe’s expressions of this idea (and of many of the ideas in the remainder of this section of the text):

available to us a readily available way of understanding how this could be. Our ordinary understanding of time, dominated as it also is by a materialistic understanding of the external, obscures from us any other perceptions of time. Time for us is only something to be measured in equal sequential units. In such time, law, as Joe displays it, cannot exist anymore than it could as material.

To compensate for our “radically purged time consciousness”⁴⁸ we think of law as within a narrative, a story in which events of the past, present, and future can be held together in a manner that belies their sequential measured nature.⁴⁹ When, however, we are pressed to think what this narrative is about we must confront the fact that each legal case consists of competing voices, each voice is treated as signifying something about us, each offered signification is overaccepted⁵⁰ by being placed within a narrative about a “we” much broader and more encompassing than that initially considered by any of the voices, and together these voices create a narrative tension about our identity. Each party, that is, always argues in the forms the law permits that its desired resolution is who “we” are and, therefore, who “we” should be in the resolution of the dispute.⁵¹ The law seeks to be authoritative, as opposed to authoritarian, in this way.⁵² Each judgment then defines us, and each appeal from a judgment is a challenge to the integrity of the identity the judgment proclaimed.

The narrative that holds time together for us, then, is about a “we” and in the performance of law, as in the performance of music, we redis-

“Time” may prove not confined or confinable to one or another of the worlds of thought and practice that works with it. We can say time in law and theology is not time as defined for purposes of other fields. Or, we can say that there is an easy and pervasive transcendence of time in law and theology, if conceiving of time as a sequence of identical units stretching out on either side of a Janus figure is too convenient to give up. No Supreme Court that in 1997 can be heard to say “In 1895 we rejected this argument” is living by the clock.

Vining, *supra* note 24, at 1050 (footnote omitted).

48. CHARLES TAYLOR, *A SECULAR AGE* 196 (2007). Much of what follows in the text has been influenced by Taylor’s analysis.

49. For a beautiful exploration of narrative as a humanizing of the time we understand as sequenced events, see 1 PAUL RICOEUR, *TIME AND NARRATIVE*, (1984).

50. The term “overaccept,” by which I mean to accept what is offered in the light of a larger narrative is from SAMUEL WELLS, *IMPROVISATION: THE DRAMA OF CHRISTIAN ETHICS* 131-42 (2004). Wells borrows the term from improvisational theatre. *Id.*

51. This, too, has an analogy to music. See, e.g., HIGGINS, *supra* note 8, at 171-73, discussing how music both expresses and defines our identity.

52. Notice here a deep connection between this understanding of law and the previous discussion of beauty. For in place of “an intrinsic violence of rhetoric . . . , a practice of persuasion for persuasion’s sake, violence, coercion at its most enchanting.” HART, *supra* note 29, at 3. Law makes an appeal to the beauty of a justice that supervenes upon it. This is the way in which legal rhetoric is not itself reducible to force.

cover that we are social beings.⁵³ But if we were to point to this narrative of our identity as law we would quickly face the challenge of who this “we” is. Again we would be at a loss to describe it for this “we” is mostly imagined⁵⁴ and it, too, cannot exist in sequenced time. Thinking of this “we” as the source of our law, pointing to it as law, or thinking of ourselves as a people defined by law, only takes us back to where we started. Once again we are caught by what appears to be the limits of our perception. Let us turn then, as we did before, to music. Perhaps, once again, we have not exhausted the possibilities.

Tones in a melody are experienced in a relation to other tones, as I described before, but not as in a temporal sequence or, as Zuckerkandl describes it, rolling down a bowling alley of time.⁵⁵ Instead, within the melody each tone exists in a gathered time. Zuckerkandl explains:

53. Higgins, *supra* note 8, at 150. See also BEGBIE, *RESOUNDING TRUTH*, *supra* note 8.

54. See 2 ALASDAIR MACINTYRE, *Poetry as Political Philosophy: Notes on Burke and Yeats, in ETHICS AND POLITICS: SELECTED ESSAYS* (2006). “So nations to be real must first be imagined.” *Id.* at 161. See also Taylor, *supra* note 48, at 713 for his discussion of our “imagined communities.” MacIntyre, but not Taylor, is thinking in terms of a polity defined by a nation. I am not. Instead, later on I have referred to this “we” as a “polity of law.” *Infra* at note 64 and accompanying text. I have done this because, the “we” of the law, as it is imagined, is not always coterminous with the nation. The “we” we call upon when we are to understand what nation (and being a nation) means, to stand in judgment of it, and to call it to its own ideals retains the distance needed, however slight this might be, for critical judgment. So, in this sense and in others, the law, like music, creates its own polity and is, also like music, always potentially an alternative to others. I have explored one polity of music and its role as an alternative to others in Jack L. Sammons, *Censoring Samba: An Aesthetic Justification for the Protection of Speech*, 37 STETSON L. REV. 855 (2008).

55. ZUCKERKANDL, *supra* note 3, at 181. Zuckerkandl’s analysis of the temporal elements of melody is quite close to Husserl’s although he does not reference him. See EDMUND HUSSERL, *THE PHENOMENOLOGY OF INTERNAL TIME-CONSCIOUSNESS* 43-45, 59-64 (Martin Heidegger ed., James S. Churchill trans., 1964). Husserl, however, was using this temporal aspect of melody to display our “time consciousness” as a way of understanding consciousness itself in phenomenological terms. For Husserl, it might be fair to say, any true revealing of time will display it as “gathered,” using the terminology I have used in the text. For Joe, such an understanding of time is intimately connected to “person.”

Any person exists, for us as individuals, beyond place and ordinary passing time. The very undertaking to understand the meaning of the always changing physical evidence of sounds and sights by constructing a voice from it, half-creating, associating the evidence (or not) with the voice we presuppose is there B else we would not do the work B leaps beyond ordinary time and space.

Vining, *supra* note 24, at 1051. This is not Husserl’s interest (although it may be part of Heidegger’s who takes over this understanding of time from Husserl). Similar to Joe, however, Husserl, in his last work and drawing in part on the understanding of time consciousness he displayed through an analogy to melody, sought to remind science that it too is located within what he called the “lifeworld.” Science, too, he said, is a mode of transcendental subjectivity and only in the field of transcendental intersubjectivity can science be understood as a constitutive achievement. See EDMUND HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* (Martin Biemel ed., David Carr trans., 1970). For an

The essence of the musical tone, its dynamic quality, lies precisely in its relation to something that itself *is not there*, any turning back of consciousness for the purpose of making past tones present immediately annuls the possibility of [melody] . . . [and] the like holds for the anticipation of coming tones.⁵⁶

This same temporal phenomenon also holds true for meter. When you count off meter, one . . . two . . . one . . . two, in its simplest form, these have meaning, and the force of meter is experienced, only in their relation one to the other, but this meaning and force disappear if you “anticipatorily represent ‘two’ to [yourself] while ‘one’ is present . . .” and the same if we “tried, by remembering, to make ‘one’ present simultaneously with ‘two’ . . .”⁵⁷ If you do either, all perception of meter disappears.

What this means is that in music, the “no more,” and the “not yet,” are gathered together in a “now.”⁵⁸ This, he says, is a time in which we do not look backwards into a past or forward into a future but one in which time itself looks backwards and forwards.⁵⁹ The past is not extinguished because “time itself stores it” and the future is not impenetrable because “time always anticipates itself. . . .”⁶⁰ Thus, in music we can perceive gathered time; we can feel it. Whatever music is about seems to be something that occurs, and only occurs, within music’s gathered time.

What music reveals is a dimension of time that our ordinary understanding of time obscures from us or even denies.⁶¹ Note, quickly again, that this too need not be about something transcendent in our typical understanding of the term. It too does not transcend our abilities to perceive, but is a matter of our ordinary perceptions, and no particular belief, other than a belief in our perceptions, is required. Music, it is often said,

excellent summary and explanation of Husserl’s work, see MATHESON RUSSELL, *HUSSERL: A GUIDE FOR THE PERPLEXED* (2006).

56. ZUCKERKANDL, *supra* note 3, at 231.

57. *Id.* at 227.

58. *Id.* at 227-28. This is not a claim by Zuckerkandl that music can be experienced, as it were, “at a glance,” an observation often used by others for a variety of purposes, but one that raises difficult problems. See, e.g., Peter Kivy, *Mozart and Montheism: An Essay in Spurious Aesthetics*, Vol. 2 No. 3 JOURNAL OF MUSICOLOGY 322 (1983).

59. ZUCKERKANDL, *supra* note 3, at 228.

60. *Id.*

61. For a short, lovely, and lively telling of the history of this idea in sacred music, see David P. Goldman, *Sacred Music, Sacred Time*, 197 FIRST THINGS 31 (2009).

The tension between the two sets of expectations, the simple hymn-tune and the overlaid counterpoint, generates a sense of the sacred. Bach cannot put the infinite into notes, but by transforming our perception of time, he can attune our mind’s ear to a higher order of time. The sense of the sacred arises from the response of our mind’s ear (Augustine’s ‘consideration’ or *numerus judicialis*) to the juxtaposition of two temporal frameworks.

Id. at 35.

reveals to us eternity, and this can be true, but, it is an eternity found within the present, and not at the end of a long series of sequential events in measured time.

But what is music about? Well, it is about music we can say when we remember that beauty supervenes upon it. This means, for the form of music we have been describing,⁶² it is about a series of tensions and resolutions that start small in the tension felt in each tone, and expanded to include the tensions—the tension of other tonal expectations like the return to the tonic or tonal center, the tension of dissonance into consonance, the tensions of rhythmic delay, and so forth—and resolutions intended by the composer and those not intended that arise from the music itself. These tensions are not negatively problematic, nor are they means to an end, but are instead constitutive of an exploration of the reality of music as it exists in its gathered time in which the elements of music are laid bare before us in their relations one to the other. So these tensions are not only not negatively problematic, they are to be sought out and forever maintained in an insisted upon, tension-creating, difference within the flow of music.⁶³

If we want to understand how there can be law as existing outside of time we need only think of the law in the same way as we have been thinking of music. For law too can be seen as existing within a gathered time. It too is about tensions and resolutions which are issues of the identity of a “we,” a polity of law, itself known only in the law’s gathered time, but as real in its gathered time as a melody is in its. In this the law lays bare the relations among the materials of its art—social relations narratively presented—as music does the materials of music.⁶⁴ And in this, tensions—differences, even radical differences—are not negatively problematic, nor even means to an end, but constitutive of an exploration of law that is an exploration of who we are and ultimately who we are *as* difference. The law is not a coping with difference as if we are born in hostility and cannot escape it any more than we would describe music as merely a coping with difference. Law seeks, instead, to be a joyful exploration of our difference, a reflection of “the polyphony” of our ongoing existence,

62. I have offered the cautious description “for the music we have been describing” because there are some composers who sometimes say that they are seeking to avoid tension in their compositions. (And, in my opinion, create a tension in their compositions—often a very enjoyable one—in doing so.) Whether they are successful or not is a matter of debate. See, e.g., Jeremy Begbie’s discussions at BEGBIE, *RESOUNDING TRUTH*, *supra* note 8, at 163-82, and BEGBIE, *THEOLOGY, MUSIC, AND TIME*, *supra* note 8, at 128-54.

63. “Musical experience . . . can be described as enjoying tension.” HIGGINS, *supra* note 8, at 165. Music “presents tensions, not as obstructions, but as themselves vehicles to the achievement of resolutions.” *Id.* at 167.

64. “And Buber is surely correct in supposing that there is, or should be, some ‘artistry,’ some reciprocal education of form, of *beauty*, in human relationships.” LASH, *supra* note 24, at 190.

in Bonhoeffer's words.⁶⁵ This, I think, is the understanding of time in law toward which our analogy to music, with its treatment of time as an event, points us.

I want to continue in this way a little further. For what may be most interesting here for our purpose is that the tensions of music are never fully resolved in any musical work. For example, in each return to the tonic—which is a way of resolving a created tonal expectation within a melody—the tension seems teleological, headed toward a particular resolution, but it is not. Instead, when there is a return to the tonic or tonal center, what is heard is heard as something different, as a new starting point, in other words, as the music points beyond the resolution and seeks to go on. So the tension is never fully resolved. (The same is true for a final return to a theme used for variations, as, for example and perhaps most famously, in Bach's Goldberg Variations.) There is, then, never finality in music; never a complete ending; never an end to the revealing of music's insisted upon difference. The ongoing tensions in music may often be hidden on different levels, and often enough not within the contemplation of the composer, but they are always there.

We do not, however, need to rely on tones to display this force that seeks to go on for it is there in rhythm as well. Rhythm, Zuckerkandl teaches, is always two-faced:

[A]s it is responsible for the organization of the individual measure, it is perpetually intent upon closing a cycle, reaching a goal; it wills the finite. On the other hand, with its renewed, ever more insistent "On! Once again!" which hammers out measure after measure, it is a striving without end that accepts no limits, a willing of the infinite.⁶⁶

Each rhythmic wave is part of a larger group of subordinate and superordinate waves, two of which we always hear, that extend beyond any final resolution or ending of any single wave.⁶⁷ Each rhythmic wave is perceived as part of a larger whole as each tone is also perceived. When there is "a movement toward closure at one or more levels, and just because of

65. DIETRICH BONHOEFFER, LETTERS AND PAPERS FROM PRISON: THE ENLARGED EDITION 305 (1972).

66. ZUCKERKANDL, *supra* note 3, at 174.

67. *Id.* at 187.

this repeated closure, a concurrent forward thrust [is felt] at another level.”⁶⁸ And so, “. . . *metrically speaking, the piece never finishes.*”⁶⁹

This may sound unduly technical, especially when offered by someone like me who is not a trained musician. But it need not be technical. For almost every day, largely unnoticed, we experience the fact that music does not want to end. Listen, for example, to almost any piece of popular music and consider how the composer has found a way to cope with music's desire to go on: fading out the song (in which the composer gives in to the desire and what we hear is the music continuing until it can no longer be heard, as if the performers were walking away from us, playing on as they went); repeating a short musical phrase or lyric over and over (with a clear implication that in its circularity it could continue forever); suddenly interrupting a melodic line (and leaving its continuation, along with the question of its ending, to the audience); extending the last note (and passing the problem along to the tone which, in years well past, would have had a practical durational limit); dramatizing the ending (as if the music had been rising or falling and would not end without a dramatic interruption like a crash or an explosion); and so forth. Consider as well the occasional song that does none of this and ends abruptly, and consider our reactions to such. Or, finally, consider the exceedingly odd phenomenon of music getting “stuck in your head,” as we say, which is to say a song, melody, phrase or rhythm imposing its continuation upon you even as you resist it.

Good composers use this force, this desire that music has to continue, in clever ways in their compositions. For a popular music example, consider “This is Just A Modern Rock Song,” written by Stuart Murdoch of Belle & Sebastian. The last verse, which the singer also acts out in his singing, goes like this:

This is just a modern rock song,
This is just a tender affair,
I count “three, four” and then we start to slow,
Because a song has got to stop somewhere.⁷⁰

Each of these partial endings in music, like this one, and each silence that follows a song, carries with it a certain shared and strange feeling—a

68. BEGBIE, *THEOLOGY, MUSIC AND TIME*, *supra* note 8, at 43. Begbie is explicating Zuckerkandl's analysis.

The crucial point to note is this: however complex the process gets, one level's return is always another's advance. However strong closure may be at any one level, there will always be levels in relation to which closure generates an increase in tension, giving rise to a stronger reaching out for resolution.

Id. at 107.

69. *Id.* at 125.

70. BELLE & SEBASTIAN, *This Is Just A Modern Rock Song*, on *THIS IS JUST A MODERN ROCK SONG* (Jeepster 1998). You can find this on the EP, *This is Just a Modern Rock Song* (Jeepster Records, 1998).

sense of regret, of embarrassment, a feeling of nakedness, of sadness, of longing—that is exceedingly difficult to describe. We avoid it in public through our applause. This “speaking silence,” too, is a force that becomes part of the material of the good musical artist.

Such is music. A person who has not pre-analytically felt the forces of music, felt its motion, felt the tensions, the resolutions, the ongoing explorations of meaning, along with the creation of a sense of direction in which these continue forever, has not understood music.

I would suggest to you, that a person, a judge or a lawyer, who has not pre-analytically felt the tension, the movement, and the resolution, along with the creation of a sense of direction in which these seem to continue forever, has not understood the law.

But if we do perceive law, as we perceive music, as directional, ongoing, pointing toward something, and taking us there, toward what is it taking us? There could no more be a teleology for such law than there could be for music. In this context, each offered teleology would be a threatened corruption: a predetermination of who “we” are, a decision on material grounds, or a self-projection. Instead of a teleology, we seem to have the self-justifying activity that all art is with ends not to be known apart from its particularities.

We could, as I suggested earlier, address this normative concern *via negativa*. There are ways of doing law inconsistent with this reality of it: finalities, instrumentalities, externalities, abandonments of the particularity, of intentionality, and so forth. Again, much of what we might desire here in the form of something normative can be found in these. But let us, as we did before, look at virtue and this time ask what other virtues, beyond the self-effacement of the artist as a recognition of our finitude, the reality of law requires of us.

If law is not teleological, if it is not a means to an end, and yet points us toward an end for which we wait, then the law is, as Joe has suggested, eschatological.⁷¹ It offers an eschatology made possible only within a gathered time; one that demands we wait. Such waiting in the law necessarily requires our continuing patience with difference, even radical difference, to which we are to submit ourselves, even to rejoice, as an act of security that only faith, hope, and charity can provide. The form this charity takes in law is as something we give to ourselves: the charity of hearing each voice as signifying; the charity of the over reception I described earlier;⁷² the charity of our humility before the law’s excess; the charity of trusting this excess as that to which we turn in our social judgments of one another; the charity of our trusting an aesthetic, that is, trusting who we are in our human fullness; and the charity of a “we” to which we all belong.

These virtues manifest an awareness of the “not yet” of our existence, captured in the present, as a faithful longing. The impatience of the ordi-

71. VINING, FROM NEWTON’S SLEEP, *supra* note 1, at 20.

72. *Supra* notes 40-41 and accompanying text.

nary world, we know, stands in opposition to this. It is impatient, as John Milbank teaches us,⁷³ because there is nothing to wait for, because time is only now, and all of our projects—past, present, and future—are failed projects of our hostile difference. Against this backdrop we have this odd form of law and a supervening justice that asks that we be patient, points out our finitude, and gives us back a gathered time that can be narrative, even musical!⁷⁴

As I have described it, the form this patience takes matches in Christian eschatology the patience required in the times between. It has its analogues in all Hebraic religions. The point of this is not to say that justice is Christian or that it is Hebraic, but that this thing we call “law” depends upon virtues that can only be well understood as theological ones. But what then does it mean for us that this is the case? I only want to say here that the law, the real law, necessarily raises the question I asked initially: What must the world be like, what must we be like, if between the world and us such a phenomenon of law can occur?⁷⁵ If Joe has displayed this law for us correctly as I believe he has, the answer to this question will reveal something truthful about us. Let me return to the Rowan Williams quote above: “[T]he artist looks for the ‘necessity’ of the thing being made, but this ‘necessity’ can only be shown when the actual artistic form somehow lets you know that the necessity is not imposed by the hand of an artistic will but uncovered as underlying the real contingency of a world that has been truthfully imagined, within its own proper time and space, its own causality and coherence.”⁷⁶ The “truthfully imagined world” of the law seems to be that we are creatures, incarnated, with an eschatology oriented toward an ontology of harmonious difference.⁷⁷ Law is good not because it is transcendent, for the devil is that as well (and music but a potential distraction from true devotion), but good because it reveals the truth of our existence.

I believe then that it is this theology that can best narrate law as Joe has displayed it to us, and that it can out narrate other attempted descriptions of it, especially those that would have the law grounded in an ontology of force (even as a restraint upon it),⁷⁸ or those for whom it is a

73. See, e.g., MILBANK, *THE FUTURE OF LOVE*, *supra* note 29, at 150.

74. “Faith in an internal gives us back a time that is narrative; that is musical.” *Id.* at 152.

75. *Supra* note 6 and accompanying text.

76. *Supra* note 38 and accompanying text.

77. It will be clear to those familiar with his work that much of what I say here I say under the powerful influence of John Milbank. See, e.g. MILBANK, *THEOLOGY & SOCIAL THEORY*, *supra* note 29; MILBANK, *THE FUTURE OF LOVE*, *supra* note 29; JOHN MILBANK, *THE WORD MADE STRANGE: THEOLOGY, LANGUAGE, CULTURE* (1997).

78. Descriptions of law as an alternative to force and as reducing force to argument or conversation have great importance and enormous appeal. And it is certainly the case that, at our best, we turn to law when there is a fight just around the corner. Stuart Hampshire’s *JUSTICE AS CONFLICT*, resting upon an understanding of social rationality as adversary secular reasoning and the restraints of traditions of institutionalized arguments, is one of the most persuasive of these. See

projection of self, or those that would, against the empirical evidence as Joe would have it, deny its very existence.

There are many ways of going on here, ways Joe has already explored for us, but I will “count three . . . four . . . and start to slow . . . because a [talk] has got to stop somewhere.”⁷⁹

STUART HAMPSHIRE, *JUSTICE AS CONFLICT* (2000). But, at rock bottom, Hampshire’s argument rests upon our (reasonable, always reasonable) fears, born, as he assumes we are, into the horrible insecurities of a violent world. His is a position reached, I believe, out of despair. This is why Hampshire tells us that he is a pessimist about the prospects of his own project. *Id.* at 43. And yet the failure of this project, he says, would mean that we would fall back into a chaos ruled by violence for there could be nothing else. *Id.* at 98. Surely one has to wonder about a project that, for all its value in reminding us of the harms we are doing to one another and of the importance of listening to the other side, describes itself as a likely futile response to ultimate ontological despair. There are Sisyphean days, of course, when we feel like this, but surely such despair cannot constitute the whole of our lives if we are to go on at all. An appropriate way of starting a Vining-like response to Hampshire, I think, would be to think more carefully about rhetoric, about why we think what he calls secular reason (and the character through which it persuades as Aristotle might put it) is worth listening to, about how it can avoid its own reduction to force, and so forth. One might then find a different ontology at work; one that makes more sense of our lives; and one that would give us reason to go on. Perhaps, as with music which arises from pure flux to reveal a structure within it, what we are calling chaos need not be so feared.

79. BELLE & SEBASTIAN, *supra* note 70.